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Filing Date	February 21, 2003
First Named Inventor	Jeffrey Hutchinson
Art Unit	1761
Examiner Name	Thuy Tran Lien
Attorney Docket No.	RWB-040US1

ENCLOSURES *(Check all that apply)*

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appln. No:	10/624,062
Appellant:	Jeffrey Hutchinson
Filed:	07/21/2003
Title:	METHOD AND APPARATUS FOR PRODUCING A DOUGHNUT
TC/A.U.:	1761
Examiner:	Thuy Tran Lien
Notice of Appeal Filed:	03/30/2003
Docket No.:	RWB-040US1

REPLY BRIEF UNDER 37 C.F.R. § 41.41

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S I R :

I. In response to the Examiner's answer brief in the subject appeal, Appellants respectfully would like to correct certain factual errors in the Examiner's brief.

Specifically:

In page 6 of the answer brief, referring to Appellant's brief, page 8, the Examiner states: "Appellant argues Lonergan et al. do not provide one sentence in which they mention that the process is also applicable to other material including inter alia doughnuts." (Emphasis added). This is incorrect. In fact, page 8 Appellant's brief reads: "Lonergan et al. discloses a process for creating a crisp dough when baking frozen pizzas. However Lonergan et al. do provide one sentence in which they mention that the process is also applicable to other dough material including inter alia doughnuts." (Emphasis added.).

In page 8 line 17 of the Examiner's answer, the Examiner states: "Lonergan et al. do not disclose anywhere that the use of the glaze eliminates the need to proof."

This is also not correct. Lonergan et al., explicitly state in page 9, lines 3-5 that: "Applicants have discovered that, simply by glazing a dough product prior to baking, the proper taste, texture, final baked product geometry and specific volume can be achieved, without a thawing or proofing step, or, when traditionally required, a frying step." (Emphasis added).

In page 9 line 2 of the Examiner's answer, the Examiner states: "Appellant's claims do not define any proofing parameters."

Again this is incorrect. The claims refer to forming a proven dough mixture. The specification defines the term proven dough in page 2 as: "The doughnut shapes are next transferred to a proving room where heat and humidity are added for up to 45 minutes; in this specification a reference to 'proving' is to the addition of heat and humidity. A reference to a proven product shall be interpreted accordingly.",

and further in page 4:

"The shaped dough portions are then subjected to a proving step at 40-43°C (105 to 110 °F) for 30 to 50 minutes with 55 to 60% relative humidity and left to cool for approximately 10 minutes. The proving step has the effect of increasing moisture content. This is followed by a cooling step.".

Therefore the proofing parameters are fully defined.

II. The factual inquiries set forth in Graham v. John Deere Co, 383 U.S. 1; 148 USPQ 459 (1966) for establishing obviousness have been properly summarized by the Examiner. For the reasons set forth in Appellant's brief and for the following reasons, Appellants believe that the Examiner has not properly determined the scope and contents of the prior art, ascertained the differences between the prior art and the claims at issue, considered objective evidence present in the application indicating obviousness or non obviousness, and finally and most significantly properly resolved the level of ordinary skill in the pertinent art.

The determination of the scope and contents of the prior art must be done from the point of view of the person skilled in the art to which the invention pertains. In the present instance, this person is the doughnut maker, not the casual baker who may or may not occasionally try his/her hand in baking some doughnuts.

When the casual baker reads Lonergan et al., he or she may think that applying an oleaginous glaze on a doughnut and baking the coated doughnut will produce a low fat doughnut having the same texture and taste of a fried yeast raised doughnut. However, when

the person skilled in the art of doughnut making reads Lonergan et al., he/she will be immediately stumped. First, he/she will question what type of doughnut is this process referring to? Yeast raised or cake? Both types of doughnuts are fried, it is the dough that makes them different. How is the dough prepared? If it contains yeast, is the yeast proven prior to the application of the glaze? A thorough review of Lonergan et al. does not disclose any detail as far as doughnuts are concerned. There are detailed instructions on how to make pizzas and references where to find details on how to make breads and Beignets are provided at the bottom of page 4 and top of page 5 but Lonergan et al. remain silent as to what kind of doughnut dough they refer to.

The Examiner takes the position that because Lonergan et al. refers to yeast containing pizza dough, clearly his teachings are applicable to yeast raised doughnut dough. From this point on the Examiner's position becomes speculative. This is particularly true when she addresses the issue of whether Lonergan et al. teach applying an oleaginous glaze onto the surface of proven yeast raised doughnut dough.

In page 8 line 5 the Examiner concludes that because Lonergan et al. puts glaze to the surface of the dough, rather than mixing it in the dough, the processing parameters of the dough doesn't change, and therefore "The entire disclosure of Lonergan et al. clearly indicates that proofing can take place depending on the nature of the dough product".

Applicant's respectfully strongly traverse such conclusion as completely unsupported by the Lonergan et al. disclosure and effectively contrary to such disclosure.

As stated earlier, the Examiner erroneously states that Lonergan et al. do not disclose anywhere that the use of the glaze eliminates the need to proof. Had that been true, the Examiner may have had a stronger argument. However what Lonergan et al. tells is that: "Applicants have discovered that, simply by glazing a dough product prior to baking, the proper taste, texture, final baked product geometry and specific volume can be achieved, without a thawing or proofing step, or, when traditionally required, a frying step." (Emphasis added).

Furthermore, more than one half of the Lonergan et al. specification discusses the increase in mass of the dough when subjected to the glazing/baking process. Mass increase of

the dough is typically the result of the proving step, as explained in Appellant's specification and as is well known in the art.

Therefore the conclusion of the person skilled in the art reading the full disclosure of Lonergan et al. would more likely be that Lonergan et al. clearly applies the glaze to an unproven dough and achieves the same effect as the proofing step during the baking of the dough.

Applicants respectfully submit that the Examiner has misunderstood the scope and content of Lonergan et al as prior art, has made certain unwarranted assumptions, has ignored certain critical disclosures in Lonergan and as a result has not correctly ascertained the differences between Lonergan et al. and Appellant's invention. As a result the claimed restriction "forming a proven dough" is still missing in the Lonergan et al. disclosure.

Appellants also strongly disagree with the Examiner's understanding of the teachings of Averbach, particularly the objective of such coating and the Examiner's suggestion that the person skilled in the art would apply the Averbach moisture coating to still hot baked doughnut of Appellant's invention as the doughnut exits the oven.

First the Examiner's assertion that Averbach's application of a moisture barrier improves the texture and taste of the product and is somehow similar to Appellant's efforts to create a fried doughnut texture and taste is not persuasive.

Averbach throughout the specification repeatedly states that the proposed barrier does not change to taste and texture of the doughnut. To state that the barrier improves the taste and texture of the product because the product ages more slowly stretches the limits of logic to the breaking point.

Averbach applies the moisture barrier to a doughnut that already has the proper taste and texture to preserve such taste and texture. Appellants apply a second coating to change the taste and texture. Logic tells that the two objectives are diametrically opposite. Therefore there must be some difference in what is done by Averbach and Appellants for such result to be true.

The difference lies in two things.

Averbach teaches the creation of a continuous coating film formed on the surface of the doughnut, and the presence of a wax in the coating composition. Averbach teaches the need for rapid cooling to form a continuous surface film and uses the wax to help increase the speed with which the composition coalesces on the doughnut surface after application. (Abstract of Averbach.)

Appellant's claim language clearly states that the second coating is applied to the baked proven dough while it is still warm from the baking step and or within less than three minutes from the time of exit. (Claims 1, 11 and 15).

The Examiner's position is that Averbach's composition would be understood to be applied as the doughnuts exit the oven. The Examiner has not provided any evidence regarding this but relies on speculation that the coating would be applied on the doughnuts while hot as they exit the oven because in a production line this would be the most efficient way. This appears contrary to common sense as such process would require additional cooling steps to be introduced in order to obtain the required rapid cooling.

Because Averbach other than requiring rapid cooling does not specify when the barrier coating is applied to the doughnut surface, or what is the doughnut surface temperature, we look to the art for help as to what was practiced in the art at that time .

As mentioned in Appellant's brief, U.S. Patent 4,293,572 (Silva) is the only reference on record that addresses the doughnut surface temperature and it clearly shows that the person skilled in the art would recognize that Averbach's coating should be applied to a cool surface.

The Examiner states that Silva supports her position because the person skilled in the art would consider 90-100 degrees F. to be warm. This is not quite right. 90-100 degrees F. is warm maybe to a layman discussing a summer day but it is basically room temperature to a scientist or a person skilled in the art.

It is well established that if there is any possible doubt in the meaning of a term in the claims, one must look in the specification for the proper interpretation of the term. This the

Examiner has failed to do. Appellant's specification uses the term "warm" to describe when the second spray is applied. The person skilled in art reading Appellant's specification would have no doubt that warm is not meant to be room temperature but substantially higher because the specification in describing "warm" reads:

"The baking temperature may be varied between about 210°C and about 280°C, preferably about 225°C to about 245°C, and more preferably 235°C. The post baking fat application step should be carried out while the dough is still warm, usually within 3 minutes of removal from the oven and preferably within 1 minute.".

There is no indication in the specification that forced cooling is applied. Thus "warm" in the present context as defined by the specification is a temperature of the doughnut surface a couple of minutes after it was cooked at 455 degrees F. which no reasonable person would expect to be anywhere near 90-100°F.

Therefore Averbach, when viewed in light of the scope and content of the prior art as would be understood by the person skilled in the art does not suggest the step of applying an oleaginous composition to a warm proven doughnut surface as claimed.

It follows that even if Lonergan et al. and Averbach were combined there would still be claim limitations not present in the combination and such limitations would not be obvious in view of the art on record.

The Examiner's arguments regarding the applicability of Loh et al. are strongly traversed.

First Loh et al. explicitly states that his process applies to cake doughnuts not to doughnuts in general. Appellant's process relates to yeast raised doughnuts. Loh et al. distinguishes yeast raised doughnuts from cake doughnuts at the very start of this reference. Why the person skilled in the art would want to apply a process step that another person skilled in the same art has already stated is only applicable to a different product defies understanding.

Second, the Examiner's statements that Loh et al's process prevents undesirable crust formation (and therefore would be applicable in appellant's process) makes no sense. Fried

yeast raised doughnuts have a crusty surface. The whole point of the present invention is to provide such crusty surface without actually frying the dough. If anything Loh et al. teaches away from the present process.

Finally the Examiner's statement that applying the steam as Loh et al. teach, prevents undesirable crust formation which might preclude proper expansion and structure formation is puzzling. Is the Examiner now Admitting that dough expansion desirably occurs during the baking process, as Lonergan et al state, rather than the proofing stage claimed by the Appellants?

One would think it clear that nothing in Loh et al. would suggest that steam application in the claimed process is an obvious step in making yeast raised doughnuts.

III. An issue raised by the Examiner and extensively discussed in Appellant's brief relates to the use of the term "consisting essentially of". The Examiner's appears to require that Appellant's provide proof demonstrating the criticality of excluding additional components in Appellant's coating composition.

This request is inappropriate in the present instance for the reasons given in Appellant's brief. As explained Appellants have defined in their specification what exactly is meant by their use of the language "said coating consists essentially of a cooking fat or combination of cooking fats".

The specification reads:

"As used herein, the term "cooking fat", unless otherwise specified, means any fat or oil known in the food preparation art, and includes as non limiting preferred examples soya, canola oil, rapeseed oil, safflower oil, corn oil, palm oil, or mixtures of these and/or other edible oils or fats, including fully and/or partially hydrogenated oils or fats.

Preferably what is applied to the dough at this stage consists essentially of cooking fat or a combination of cooking fats, and in any case, comprises at least 80 wt.% cooking fat. Small amounts of water may be present. As used herein, the term "consists essentially of cooking fat" as applied to a fat formulation indicates that the formulation consists only of fats or oils as

described above in any common grade of purity. A solid vegetable shortening is preferable because it tends to produce a less greasy final product."

Thus claims 2 and 15 are more restricted than claim 1 because the spray composition only includes fats or oils or combinations in any common grade of purity. This definition and language intends to capture fats and oils usable in the claimed process that may contain impurities that may render their use outside the claim scope and still produce an acceptable product, should Appellant have used the term "consisting of".

Appellants have the right to use language in their claims to obtain effective coverage of their invention and so long as the specification includes proper definitions such language is permissible.

IV. In their brief Appellants have provided an in depth discussion of both Lonergan et al. and Averbach and have explained the reasons why the person skilled in the art would not combine Lonergan et al. with Averbach, particularly pointing out certain issues relating to trapping of moisture by the barrier layer of Averbach as applied over the baked dough of Lonergan et al. The Examiner has raised an issue of lack of evidence as it relates to statements regarding moisture.

In Appellant's brief, Appellant's in support of what they believe to be the level of skill of the person skilled in the art, referred to a follow up patent issued to Lonergan et al., referred to in their brief as "Lonergan II". See footnote 7 referring to US Patent No. 6,787,170. While this is a later application it supports Appellant's arguments regarding the resulting "soggy" or "wet" product because of the use of the Lonergan et al. glaze. The person skilled in the art would have concluded this same as Lonergan II did.

V. For the above reasons, Appellants believe that the Examiner has failed to satisfy the obviousness criteria set forth in Graham v. John Deere and respectfully request that the rejection of all pending claims be reversed.

Respectfully submitted,

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CSK/gdb

Dated: April 30, 2007

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Gayle D. Bay